United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2635

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2635

EDWARD POTENZA

Claimant-Appellee

v.

UNITED TERMINALS, INC.

Employer-Appellant

and

FEDERAL INSURANCE COMPANY

Carrier-Appellant

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

Party In Interest-Appellee

ON PETITION FOR REVIEW OF AN ORDER
OF THE BENEFITS REVIEW BOARD

BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Appellee

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UNITED STATES DEPARTMENT OF LABOR

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ON PETITION FOR REVIEW OF AN ORDER
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BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Appellee

QUESTIONS PRESENTED

1. Whether The Benefits Review Board was correct in affirming the finding of the administrative law judge that claimant-appellee's previously asymptomatic ameloblastoma of the left mandible was aggravated by the work-related injury to his left jaw because such finding was supported by substantial evidence and in accordance with law?

2. Whether the order that claimant-appellee's attorney's fee be paid by employer/carrier was in accordance with law.

STATEMENT OF THE CASE

On October 2, 1972, Edward Potenza, claimant-appellee, sustained an accidental injury arising out of and in the course of his employment as a longshoreman with employer-appellant when he was struck on the left side of his face and shoulder by a falling carton of bananas while working on a ship. (21a, 29a).[1/]

Claimant filed a claim for compensation benefits pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 et seq., against United Terminals, Inc. and its compensation insurance carrier, Federal Insurance Company, for temporary total disability, facial disfigurement and reimbursement of medical expenses. Employer/carrier controverted the claim and it was set for hearing before an administrative law judge,

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1/Appendix is denoted by "a".

United States Department of Labor.

In his order, the administrative law judge, based upon the evidence submitted to him as trier of fact, found that a pre-existing asymptomatic ameloblastoma (cancer) of the left mandible was aggravated by the work-related injury to claimant when he was struck on the left side of his face by the falling carton of bananas. (8a). The administrative law judge also ordered employer/carrier to pay the fees for the attorney claimant retained to represent him when employer/carrier controverted the claim. (12a, 13a).

Employer/carrier petitioned the Benefits Review Board for reversal of the order and award on the grounds that they were not supported by substantial evidence or in accordance with law. The Benefits Review Board affirmed the order and award of the administrative law judge. (15a-17a-1).

Employer/carrier now seek review by this Court of the decision of the Benefits Review Board, pursuant to § 21(c) of the Act, as amended, 33 U.S.C. 921(c) (Supp. II, 1972).

ARGUMENT

THE BENEFITS REVIEW BOARD WAS CORRECT IN AFFIRMING THE FINDING OF THE ADMINISTRATIVE LAW JUDGE THAT CLAIMANT-APPELLEE'S PREVIOUSLY ASYMPTOMATIC AMELOBLASTOMA OF THE LEFT MANDIBLE WAS AGGRAVATED BY THE WORK-RELATED INJURY TO HIS LEFT JAW BECAUSE SUCH FINDING WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IN ACCORDANCE WITH LAW.

The Supreme Court has outlined the scope of review of the findings of the trier of fact in cases arising under the Longshoremen's and Harbor Workers' Compensation Act to be that the findings must be sustained so long as they are supported by substantial evidence on the record considered as a whole, O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951); are in accordance with law, Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947); and are not irrational, O'Keeffe v. Smith Associates, 380 U.S. 359 (1965).

Furthermore, the reviewing court may not set aside the findings because it would have weighed or appraised the evidence differently, Norton v. Warner Co., 321 U.S. 565, 568 (1944), and the findings must be conclusive even though the evidence would permit conflicting inferences. South Chicago Coal & Drydock Co. v. Bassett, 309 U.S. 251, 260 (1940).

Despite the transfer of primary review authority from the district courts to the Benefits Review Board, the standard for review remains the same, 33 U.S.C. 921(b)(3).[2/] Furthermore, the scope of review has been fully recognized and followed by this Court. Travelers Insurance Co. v. Locke, 56 F.2d 443, 444 (2nd Cir. 1931).

The instant case involves a claim for aggravation of a cancer, which, by its very nature, presented unusual problems of factual determination for the administrative law judge. It was discovered that claimant had an ameloblastoma of the left mandible, which is a rare, locally malignant dental cancer (56a). It was estimated that it had been growing for about 45 years but until an opening in the gum was caused by the blow claimant received (101a), the cancer had been completely asymtomatic and no one was aware of it (69a). The testimony of the expert medical witnesses was admittedly conflicting on whether the blow to claimant's face aggravated the cancer. Dr. Albanese, the treating physician, testified that he believed the blow the claimant received on his face aggravated the ameloblastoma (68a, 69a, 75a, 76a, 99a). The physicians who were witnesses for the employer disagreed (135a, 152a, 174a). However, it is almost impossible to obtain a definitive medical opinion in cancer cases because "the medical profession

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2/Prior to the effective date of the amendments to the Act, November 26, 1972, the U.S. District Court reviewed the decisions of the trier of fact. The Benefits Review Board is now the first court of review.

necessarily has difficulty in making positive assertions and will continue to do so until the cause of cancer is definitely and scientifically established." Charleston Shipyards v. Lawson, 227 F.2d 110, 113 (4th Cir. 1955). The administrative law judge recognized that his finding of causation could only be based on a very strong probability due to the lack of knowledge about the etiology of cancerous growths and the resultant conflicts in the medical testimony (12a, Finding 16, Order and Award). However, he cited many decisions in which triers of fact found that trauma could cause or aggravate a cancer despite strong medical testimony to the contrary (9a, Footnote 2, Order and Award).[3/]

Likewise, reviewing courts, including this court, have generally taken the approach that when a pre-existing cancer gets worse following some trauma, a finding of aggravation will stand despite conflicting medical testimony. Harrington v. Sharff, 305 F.2d 333, 337 (2d Cir. 1962), Charleston Shipyards v. Lawson, supra; Southern S.S. Co. v. Norton, 41 F. Supp. 103, 104 (E.D. Pa. 1941). Furthermore, reviewing courts have recognized

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3/Appellants make much of distinguishing the particular facts in the cases cited by the administrative law judge from the case at bar. However, the purpose of the numerous citations in Footnote 2 of the Order and Award was to illustrate the fact that many courts have arrived at a similar conclusion in cancer cases despite conflicting medical testimony as in the instant case.

that it is purely within the province of the trier of fact "to select the more reasonable inferences in light of the evidence as a whole and the common sense of the situation," even to the point of reaching conclusions contrary to the weight of the medical testimony. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962). The administrative law judge is not bound by any medical testimony and can reject all or part of the testimony of a medical witness. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, reh. denied, 391 U.S. 929 (1968); Todd Shipyards Corp. v. Donovan, supra.

It is clear that employer/carrier's selection of the testimony in the record which it believes to be more favorable to its cause is an incorrect application of the standard of review because it is, in reality, a reweighing of the evidence, rather than a test of the existence of substantial evidence.

Thus, there was substantial evidence on which the administrative law judge based his finding of aggravation and the conclusion he drew could certainly not be said to be "irrational" in light of the uncertainties in the medical community itself in this area. The presumptions provided in section 20 of the Act become particularly important in cases

where the evidence of causation is ambiguous. Section 20 provides that "it shall be presumed, in absence of substantial evidence to the contrary--(a) [t]hat the claim comes within the provisions of this Act." 33 U.S.C. 920. The judicially developed tenets of liberal construction flesh out this presumption so that the intent of Congress to create remedial legislation could be fulfilled. Thus, the Act is to be liberally construed in favor of claimants so as to effectuate its humanitarian purpose of providing relief to injured employees, Voris v. Eikel, 346 U.S. 328 (1953), and factual doubts as to causation are to be resolved in favor of injured employees. Friend v. Britton, 220 F.2d 820 (D.C. Cir. 1955), cert. denied, 350 U.S. 836 (1955). In light of these principles, it can be said that not only was there evidence to support the finding of aggravation of claimant's cancer, but that such a finding was actually mandated by the evidence.

Therefore, the Benefits Review Board was correct in affirming the finding of the administrative law judge that claimant's previously asymptomatic ameloblastoma of the left mandible was aggravated by the work-related injury of October 2, 1972.

II

THE ORDER THAT CLAIMANT'S ATTORNEY'S FEE BE PAID BY EMPLOYER/CARRIER WAS IN ACCORDANCE WITH LAW.

Section 28 of the Act, as amended, provides that an attorney's fee shall be awarded against the employer or carrier if employer or carrier declines to pay any compensation within 30 days after receiving written notice of a claim for compensation and the claimant has to utilize the services of an attorney to successfully prosecute his claim.33 U.S.C. 928(a).

This provision became effective on November 26, 1972 and appellants contend that the application of this provision in a case where the accident occurred prior to November 26, 1972 is not in accordance with law, even if the services of the attorney are rendered after that date.

This Court has expressly held that the date a right of action accrues under the Act has no significance as to the application of section 28, and attorneys fees for services rendered after the date of the amendment are properly charged against the employer and carrier. Overseas African Construction Corp. and St. Paul Mercury Insurance Co. v. McMullen, 500 F.2d 1291,1297 (2nd Cir. 1974). The Ninth Circuit has held likewise, adopting the decision of this court in McMullen, supra, as the law in the Ninth Circuit. Dillingham Corp. v. Massey, 505 F.2d 1126, 1129 (9th Cir. 1974).

Thus, the administrative law judge properly made the award of an attorney's fee pursuant to section 28, as amended, and the Benefits Review Board did not err as a matter of law in affirming this award.

CONCLUSION

For the foregoing reasons, the decision of the Benefits Review Board should be affirmed because it is supported by substantial evidence and in accordance with law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief for the Director, Office of Workers' Compensation Programs, United States Department of Labor, Appellee, on Leonard J. Linden, Esq., Linden & Gallagher, 20 Vesey Street, New York, New York 10007, attorneys for appellants; and Edward Potenza, 238 Harrison Street, Leonia, New Jersey 07605, claimant-appellee, by mailing a copy thereof by certified mail.

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